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Recent Cases

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DIVORCE—NEW JERSEY'S DECISION ON THE ELIGIBILITY OF ASSETS FOR EQUITABLE DISTRIBUTION

Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974)

On May 14, 1971, the New Jersey legislature enacted[1] the first major revisions in the state's divorce statutes since 1907.[2] Among the reforms adopted[3] was a provision which authorizes the courts of the state, upon granting a decree of divorce, to make an "equitable" distribution between the spouses of assets "acquired . . . during the marriage."[4] This was the first such authorization for the distribution of marital property in the history of the state.[5] Yet

1. N.J. STAT. ANN. § 2A:34-1 to 2A:34-27 (1974).

2. Painter v. Painter, 65 N.J. 196, 203, 320 A.2d 484, 487 (1974).

3. The comprehensive nature of the other changes wrought by the statute precludes all but the briefest mention here. Primarily, the thrust of the legislation seeks to de-emphasize the relevancy of fault as a factor in the breakdown of a marriage. Therefore, the statute provides the state's first "no-fault" grounds based upon eighteen consecutive months separation between the parties without reasonable prospect of reconciliation. The statute also broadens previously existing definitions of grounds for fault divorces and eliminates recrimination and "clean hands" as defenses. Also for the first time alimony may be awarded to either spouse. Previously, alimony was permitted only to the wife. For a detailed analysis of the new statute and its effects upon New Jersey divorce law, *see* Skoloff, *The Divorce Reform Law—A Brief Review*, 94 N.J.L.J. 701 (1971); Editorial, *The New Divorce Law—Alimony and Property Distributions*, 94 N.J.L.J. 556 (1971); and Note, *The 1971 New Jersey Divorce Law*, 25 RUTGERS L. REV. 476 (1971).

4. N.J. STAT. ANN. § 2A:34-23 (1974) reads in pertinent part as follows:

> In all actions where a judgment of divorce or divorce from bed and board is entered, the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.

5. Disposition of property formerly depended upon the existence of special equities within the individual case or an agreement between the parties. *See* Tischler, *Distribution of Property Upon Divorce*, 94 N.J.L.J. 1109 (1971). New Jersey's equitable distribution statute places the state within

the legislature did not explain the meaning of the statutory language; no further definition of the crucial terms was offered.[6] Especially unclear was the meaning intended for the term "acquired." Shortly thereafter, the superior court granted plaintiff Stephen Painter a divorce[7] from his wife, Joan, after nineteen years of marriage. A determination of the assets accumulated during the marriage was necessary for purposes of distribution. It was found by the court that a substantial percentage[8] of the assets of each spouse

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the majority of American jurisdictions which have statutes authorizing their courts to effectuate such a distribution. *See, e.g.* ALASKA STAT. § 09.55.210(6); ARIZ. REV. STAT. ANN. § 25-318 (1974); CAL. CIV. CODE § 4800 (West. 1970); COLO. REV. STAT. ANN. § 46-1-5(2) (1963); DEL. CODE ANN. tit. 13, § 1531 (1953); HAWAII REV. STAT. § 580-47 (1973); IDAHO CODE ANN. § 32-712 (1973); ILL. ANN. STAT. ch. 40, § 18 (Smith-Hurd, 1956); IOWA CODE ANN. § 598.21 (1974); KAN. STAT. ANN. § 60-1610(b) (1964); KY. REV. STAT. ANN. § 403.190 (Supp. 1974); LA. CIV. CODE ANN. art. 155 (West 1952); ME. REV. STAT. ANN. tit. 19, § 722-A (1974); MD. ANN. CODE art. 16, § 24 (1957); MICH. COMP. LAWS § 552.19 (1948); MINN. STAT. ANN. §§ 518.54, 518.58 (1974); MO. ANN. STAT. § 452.330 (1974); NEB. REV. STAT. § 42-231 (1968); NEV. REV. STAT. § 125.150 (1967); N.H. REV. STAT. ANN. § 458.19 (1968); N.J. STAT. ANN. § 2A:34-23 (1974); N.M. STAT. ANN. § 320-14 (1973); N.D. CENT. CODE § 14-05-24 (1943); OKLA. STAT. ANN. tit. 12, § 1278 (1931); ORE. REV. STAT. § 107.105(1)(e) (1974); S.D. CODE § 14.0726 (1939); TENN. CODE ANN. § 36-825 (1974); TEX. FAMILY CODE art. 3.63 (1973); UTAH CODE ANN. § 30-3-5 (1967); VT. STAT. ANN. tit. 15, § 751 (1974); WASH. REV. CODE ANN. § 26.08.110 (1972); WYO. STAT. ANN. § 20-63 (1957).

6. The task of the New Jersey courts in discerning the intent of the legislature as to the property considered eligible for distribution was made especially difficult by the fact that the legislative history of the provision went unrecorded. In addition, the legislation was found to have been the product of "original draftsmanship," not adapted from the law of any other state. Tucker v. Tucker, 121 N.J. Super. 539, 544, 545, 298 A.2d 91, 94 (Ch. Div. 1972). The omission of a more specific statement on this question is perhaps attributable to the fact that the equitable distribution provision was added as an amendment to the divorce reform bill just before its enactment by the legislature. For the argument that the legislature deliberately left the answers to the basic issues of property distribution to the courts because of its realization that anticipation of all possible situations would have been impossible, *see* Editorial, *The New Divorce Law—Alimony and Property Distributions*, 94 N.J.L.J. 556 (1971).

7. Painter v. Painter, 118 N.J. Super. 332, 287 A.2d 467 (Ch. Div. 1972). The divorce was sought under the new "no-fault" grounds of eighteen consecutive months separation without reasonable prospect of reconciliation. The fact that a divorce is based on fault does not, however, bar the guilty party from the right to a distribution of property. Chalmers v. Chalmers, 65 N.J. 186, 193, 287 A.2d 478, 482 (1974). Nor is the misconduct to be considered as a factor in the distribution itself. *See* note 80 and accompanying text *infra*.

8. Painter v. Painter, 118 N.J. Super. 332, 334, 335, 287 A.2d 467, 468 (Ch. Div. 1972). Plaintiff's total assets were valued at approximately $230,500 of which nearly $143,000 had been acquired before the marriage or through gift and inheritance during the marriage. Corresponding figures for the defendant approximated $99,700 and $35,000 respectively. A further

had been obtained during the marriage through gifts or inheritances to the parties as individuals. In making the distribution, the superior court was required to decide whether or not the legislature had intended that assets so obtained were to be considered "acquired" and thus eligible for distribution upon divorce. The court ruled that the term did not encompass assets so obtained.[9] This holding favored the plaintiff.[10]

On appeal to the New Jersey Supreme Court, the appellant did not directly challenge the lower court's interpretation of the legislative intent behind the statute's distributory provisions.[11] Rather, she contended that the provision itself was unconstitutionally vague in failing to define adequately the meanings of "equitable" and "acquired."[12] In *Painter v. Painter*,[13] the supreme court rejected appellant's constitutional contentions.[14] However, it reversed the lower court's ruling on the types of assets subject to

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breakdown of the assets, revealing the amount acquired by each party through gift and inheritance during the marriage as opposed to the amount acquired by each before the marriage, is not available. Each spouse was then awarded $26,750, which represented a half-interest in the marital home and its furnishings and fixtures. This left approximately $87,500 of the plaintiff's assets and $64,700 of the defendant's to be distribubted between them.

9. *Id.* at 336, 287 A.2d at 469. This holding was followed in Capozzoli v. Capozzoli, 121 N.J. Super. 285, 287, 296 A.2d 661, 662 (Ch. Div. 1972); SC v. AC, 123 N.J. Super. 566, 568, 304 A.2d 202, 204 (Ch. Div. 1972); and Greenberg v. Greenberg, 126 N.J. Super. 96, 101, 312 A.2d 878, 881 (Ch. Div. 1973).

10. *Id.* at 337, 287 A.2d at 470. Defendant was awarded twenty per cent of the difference of the totals of the *available* assets of plaintiff and defendant. This totaled $4,874. The figures in this case illustrate the dramatic difference that an exclusion of assets obtained through gift or inheritance can make to the parties involved in the distribution. Had the assets so obtained been included in *Painter*, the award of an identical percentage to the defendant would have equaled up to $33,200, depending on what proportion of the excluded assets had been obtained during the marriage by gift or inheritance as opposed to having been acquired before the marriage. Under the old statute, the defendant would have received nothing through a distribution absent special equities. *See* note 5 *supra*.

11. Painter v. Painter, 65 N.J. 196, 202, 320 A.2d 484, 487 (1974).

12. *Id.*

13. 65 N.J. 196, 320 A.2d 484 (1974).

14. *Id.* at 209, 213, 214, 320 A.2d at 490, 493. On the same day of the *Painter* decision, June 5, 1974, the New Jersey Supreme Court announced its holdings in three companion cases which rejected other constitutional challenges to the new divorce statute. In Chalmers v. Chalmers, 65 N.J. 186, 193, 320 A.2d 478, 482 (1974), the statute was held constitutional even though it served to deprive the plaintiff of her allegedly vested right in a condonation defense against the defendant. The defendant's alleged condonation had preceded the enactment of the statute, which abolished such defense. In Rothman v. Rothman, 65 N.J. 219, 232, 320 A.2d 496, 503 (1974), the retrospective application of the equitable distribution provision to assets acquired prior to its enactment was held constitutional against a claim that such application created a deprival of property without due process. *Rothman* was cited as controlling on this issue in both *Painter* and Scalingi v. Scalingi, 65 N.J. 180, 195, 320 A.2d 475, 478 (1974), where the issue had also been raised.

distribution.[15] The court held that *all* assets in which either spouse gains an interest during the marriage are deemed "acquired" and are eligible for distribution upon divorce.[16] The court affirmed the superior court's rulings[17] that assets obtained by either spouse *before* the date of marriage are ineligible for distribution.[18] Included within this immune category are assets exchanged for assets obtained before the marriage or purchased with the proceeds of their sale where traceable.[19] Further, the court held that increases in the value of ineligible assets are also ineligible, even if such increases occur during the marriage.[20] Finally, the court defined the phrase "during the marriage," for purposes of distribution, as the period between the date of the marriage ceremony and the date of the filing of a complaint by either party requesting a decree of divorce.[21] This note will analyze the *Painter* decision and its relation to the controversy over the eligibility of assets for distribution upon divorce. This controversy is based upon the differences between the common law and civil code conceptions of marital property.

Under the common law, property owned by the spouses is held by them as tenants by the entirety.[22] This reflects the idea that, at common law, the husband and wife are considered one.[23] The husband retains title to all property which he brings into the marriage and assumes an absolute title to all chattels of the wife and to those of her choses in action which he reduces to possession during the marriage.[24] Since only a married couple may hold by the entireties,[25] this form of ownership necessarily terminates upon divorce. However, in the absence of a statute, rights which have vested prior to a divorce remain valid.[26] Therefore, upon divorce, the husband may keep all property which was originally his as well

15. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 494 (1974).
16. *Id.* at 217, 320 A.2d at 495.
17. Painter v. Painter, 118 N.J. Super. 332, 336, 287 A.2d 467, 469 (Ch. Div. 1972).
18. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974).
19. *Id.*
20. *Id.* The language of the decision indicated, however, that this holding might not be applicable under all circumstances. *See* note 93 and accompanying text *infra.*
21. *Id.* at 218, 320 A.2d at 495.
22. I. BAXTER, MARITAL PROPERTY 7 (1973). There is some confusion whether personalty as well as realty is held by the entireties at common law; in any case, the husband takes title to all marital property.
23. *Id.* at 3.
24. C. VERNIER, 2 AMERICAN FAMILY LAWS 231 (1932).
25. *Id.*
26. *Id.* at 215.

as all of the wife's property to which he assumed title by virtue of the marriage.[27] However, the trend toward legal recognition of the equality of the sexes has led to the modification of the harsh rules of tenancy by the entirety in the majority of states.[28] Those states retaining that form of ownership generally provide by statute that a divorce converts a tenancy by the entirety into a tenancy in common with a right of partition between the spouses.[29]

In comparison, the civil code, followed in eight states,[30] classifies both the real and personal property of either spouse as "community" or "separate."[31] Community property is owned by the spouses equally. This is based on the view that the marriage is a partnership, to which each spouse is considered an equal contributor.[32] Upon divorce, only community property may be divided.[33] All property acquired by the contributions or effort of either spouse during the marriage is considered community property.[34] Property obtained through gift, devise, or bequest, however, is not considered acquired through effort and remains the separate property of the individual recipient.[35]

The fact that the common law makes no such distinction as to property obtained by gift, devise, or descent was the principal reason for the *Painter* court's reversal of the superior court's ruling that such property is ineligible for distribution upon divorce.[36] Absent express legislative direction, the supreme court was reluctant to adopt a concept of the civil code into the statutes of a state with common law origins.[37] This reasoning, however, oversimplifies the controversy. Despite its genesis within the civil code, the idea of excluding from distribution assets obtained through gift or inheritance has superseded the division between the "community property" and common law states. The ineligibility of assets so obtained has been abrogated by the case law of two community property states.[38] In turn, it has been adopted by statute in five

27. *Id.* A divorce does, however, destroy those contingent rights which cannot vest unless the marriage continues. These include the inchoate rights of dower and curtesy.

28. 4A R. POWELL, THE LAW OF REAL PROPERTY 697 (rev. ed. 1973).

29. *Id.* at 708.

30. *Id.* at 714. These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The adoption of the civil code by these states is attributable to the heavy Spanish influence within these states early in their development. For modifications in the original civil code within these states, *see* notes 70-72 and accompanying text *infra.*

31. *Id.*

32. 1 W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 147 (1943).

33. 4A R. POWELL, THE LAW OF REAL PROPERTY 714 (rev. ed. 1973).

34. *Id.*

35. 1 W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 171, 172 (1943). *But see* note 76 *infra.*

36. Painter v. Painter, 65 N.J. 196, 216, 217, 320 A.2d 484, 495 (1974).

37. *Id.*

38. Bryant v. Bryant, 478 S.W.2d 602, 605 (Tex. Civ. App. 1972); Friedlander v. Friedlander, 80 Wash. 2d 293, 305, 494 P.2d 208, 215 (1972).

common law states[39] and by the draftsmen of the Uniform Marriage and Divorce Act.[40]

The *Painter* court was also confronted with equally controversial issues regarding the distributive eligibility of property obtained by means other than gift or inheritance.[41] Specifically, the court had to determine the eligibility of property obtained by each spouse prior to the marriage, and, in addition, property purchased with the proceeds from the sale of such previously owned property. The court's professed hesitancy to adopt principles of community property was not maintained in its holdings on these questions. Instead, the court manifested a willingness to adopt, if not exceed, the exclusionary rules presently prevailing among the community property jurisdictions.

The court framed its statements as to the distributive eligibility of assets within its answer to the constitutional question of whether the term "acquired" as employed within the statute is sufficiently meaningful to withstand a challenge of vagueness. This encompassed the most significant portion of the decision. This answer was preceded, however, by the court's replies to two other constitutional challenges against the equitable distribution provision.

The first such challenge focused upon a section[42] of the state constitution which requires that every statute have but one object which must be expressed within its title. It was alleged[43] that the provision regarding equitable distribution was void because the term "equitable distribution" had not been included within the title of the new divorce statute.[44] The court rejected this contention.[45]

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39. COLO. REV. STAT. ANN. § 46-1-5(2) (1974); KY. REV. STAT. ANN. § 403.190 (Supp. 1974); ME. REV. STAT. ANN. tit. 19, § 722-A (1974); MINN. STAT. ANN. § 518.54 to 518.58 (1974); MO. ANN. STAT. § 452.330 (1974).

40. UNIFORM MARRIAGE AND DIVORCE ACT § 307, alternative §(B) (as amended 1973). The 1973 amendment re-created § 307 into two alternatives. Alternative "A" authorizes the distribution of all property "belonging to either or both spouses however and whenever acquired." Alternative "B" authorizes the division of community property only.

41. *See* notes 63-72 and accompanying text *infra.*

42. N.J. CONST. art. IV, § 7 provides in part:

> To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

43. Painter v. Painter, 65 N.J. 196, 206, 320 A.2d 484, 489 (1974).

44. N.J. STAT. ANN. § 2A:34-1 to 2A:34-25 *formerly* L. 1948, c. 320 is entitled as follows:

> An Act concerning actions for divorce and nullity of marriage, alimony, maintenance and custody of children, and amending N.J.S. 2A:34-1 through 2A:34-3, 2A:34-7 and 2A:34-8, 2A:34-20 and

Its reasoning followed the long-established rule that the omission of a provision within the title of a statute does not invalidate the neglected provision.[46]

The second challenge was directed at the language of the statutory provision itself. The appellant contended that the provision's authorization of an equitable distribution was void because the term "equitable" was impermissibly vague in describing how the trial courts are to allocate the marital property.[47] The court, however, held that "equitable," without more, is sufficiently descriptive of the desired distributive result.[48] The decision reflects the idea that statutory instructions to the judiciary are dismissed for vagueness only when the instruction is so unclear as to result in arbitrary and inconsistent adjudications.[49] The court noted that such instructions have invariably been upheld although phrased in terms closely synonymous with "equitable."[50] Especially significant in this regard are the statutes in many states which provide for the distribution of property on a "fair," "equitable," or similar basis. None of these statutes has been invalidated on this question.[51]

2A:34-23 and repealing N.J.S. 2A:34-4, 2A:34-5, 2A:34-9, 2A:34-10 and 2A:34-22.

45. Painter v. Painter, 65 N.J. 196, 206, 320 A.2d 484, 489 (1974).

46. *See, e.g.*, Howard Savings Inst. v. Kielb, 38 N.J. 186, 200, 183 A.2d 401, 408, 409 (1962); Kline v. New Jersey Racing Commission, 38 N.J. 109, 117, 183 A.2d 48, 52-53 (1962); Bucino v. Malone, 12 N.J. 330, 334, 96 A.2d 669, 676 (1953); Ott v. Braddock, 119 N.J.L. 507, 511, 197 A. 271, 274 (E.&A. 1938); Public Service Elec. & Gas Co. v. City of Camden, 118 N.J.L. 245, 249, 192 A. 222, 225 (Sup. Ct. 1937); State *ex rel.* Christian v. Mortland, 52 N.J.L. 521, 537, 20 A. 673, 674 (E.&A. 1890).

47. Painter v. Painter, 65 N.J. 196, 208, 320 A.2d 484, 490 (1974).

48. *Id.* at 209, 320 A.2d at 490. The court defined "equitable" as "just, under all the circumstances of the particular case." This is the universally accepted definition of the term. *See, e.g.*, Commissioner of Int. Rev. v. Mercantile Nat'l Bank, 276 F.2d 58, 62 (5th Cir. 1960); United States v. 11,360 Acres, 62 F. Supp. 968, 970 (N.D. Cal. 1945); Pearce v. Wisdom, 175 Ga. 663, 664-65, 165 S.E. 574, 575 (1932); Taylor v. School District, 128 Neb. 437, 439, 259 N.W. 168, 169 (1935).

49. *See* Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 78 (1948).

50. Painter v. Painter, 65 N.J. 196, 209, 320 A.2d 484, 491 (1974). However, in most instances, the issue of whether the term "equitable" would withstand a constitutional challenge of vagueness is never specifically raised. The question on appeal is usually whether, under the circumstances, the result reached by the lower court was an equitable one. *See, e.g.*, Reitz v. Reitz, 338 Mich. 309, 312, 61 N.W.2d 81, 83 (1953); Lacey v. Lacey, 45 Wis. 2d 378, 383, 173 N.W.2d 142, 145 (1970). That such a standard is defined sufficiently to survive constitutional challenge is apparently conceded by all parties. Even where it is not, however, the court may avoid the issue. In *In re* Eleventh Ward Bldg. & Loan Ass'n, 130 N.J. Eq. 414, 418, 21 A.2d 746, 748 (E.&A. 1941), cited in *Painter*, the issue was raised that the standard of "fair and equitable" was void for vagueness. The court there did not answer this allegation directly. Instead, it held that the judicial plan under attack had met the standard under the circumstances.

51. Painter v. Painter, 65 N.J. 196, 211, 320 A.2d 484, 491 (1974) (*citing* Addison v. Addison, 62 Cal. 2d 558, 567, 43 Cal. Rptr. 97, 102, 399 P.2d 897, 902 (1965)). Every state except Louisiana considers the distribution to be

The supreme court then offered several criteria for the guidance of the lower courts in effectuating equitable distributions in individual cases:

> Guideline criteria over the broad spectrum of litigation in this area include: (1) respective age, background and earning ability of the parties; (2) duration of the marriage; (3) the standard of living of the parties during the marriage; (4) what money or property each brought into the marriage; (5) the present income of the parties; (6) the property acquired during the marriage by either or both parties; (7) the source of acquisition; (8) the current values and income producing capacity of the property; (9) the debts and liabilities of the parties to the marriage; (10) the present mental and physical health of the parties; (11) the probability of continuing present employment at present earnings or better in the future; (12) the effect of distribution of assets on the ability to pay alimony and support; and (13) gifts from one spouse to another during marriage.[52]

These criteria are virtually identical with those enumerated in numerous other jurisdictions.[53] The criteria are intended to reveal the relative equities of the parties in the assets to be distributed. They may logically be subdivided into four categories. The first category examines the property itself, its current value, and its income producing capacity. The second considers the relative equities of each party in the ownership of the property, based primarily on the source of acquisition. While assets obtained by one party through gift, bequest, or devise cannot be excluded from distribution, the manner of procurement is properly a criterion to be considered within the distribution itself.[54] The third examines the relative future needs of each party, based upon the respective age, present income, mental and physical condition, potential earning ability, and current debts and liabilities of each. The fourth considers the duration of the marriage. This is because a very brief marriage does not generally support a party's claims of equitable rights in assets obtained by the other through, for example, gift,

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made upon a "just," "equitable," "fair," "right," or similar standard. For individual state statutes, *see* note 5 *supra*.

52. Painter v. Painter, 65 N.J. 196, 211, 320 A.2d 484, 492 (1974) (*citing* Painter v. Painter, 118 N.J. Super. 332, 335, 287 A.2d 467, 469 (Ch. Div. 1972)).

53. *See, e.g.*, Mullaly v. Mullaly, 518 P.2d 1395, 1397 (Alaska 1974); Kassebaum v. Kassebaum, 178 Neb. 812, 817, 135 N.W.2d 704, 707 (1965); Novlesky v. Novlesky, 206 N.W.2d 865, 869 (N.D. 1973); Lacey v. Lacey, 45 Wis. 2d 378, 383-84, 173 N.W.2d 142, 145 (1970); and Tischler, *Distribution of Property Upon Divorce*, 94 N.J.L.J. 1109, 1116 (1971).

54. Painter v. Painter, 65 N.J. 196, 211, 320 A.2d 484, 492 (1974).

bequest, or devise. Economic interdependence of the spouses does not usually manifest itself to a significant extent in such a marriage.[55]

The *Painter* court's rationale for enumerating these guidelines is two-fold. While the term "equitable," without more, is constitutionally sufficient to define the distribution specified by the legislature,[56] the application of that term to individual fact situations would present great difficulty to the lower courts. Furthermore, the lack of additional definition would cause a great number of appeals alleging abuse of judicial discretion. Either of these consequences would increase the burden on an already overtaxed judiciary. Consistent application of the suggested guidelines will prevent this. However, the court emphasized that the factors cannot be applied blindly; each case must be decided on its own facts.[57] The proffered criteria are neither complete in their scope nor mandatory in their application. Wide latitude in their use is implicitly sanctioned. This is in accord with the universal rule among states with equitable distribution provisions; the broad discretion which is inherently vested in the courts of those states in applying this standard to individual cases has been expressly upheld as within their authority.[58]

The court then examined the final and most significant constitutional issue: whether the statute was impermissibly vague in

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55. Conspicuously, though not expressly, absent as a criterion in the allocation of assets is any consideration of fault or misconduct. The idea of ignoring fault in the distribution of property is not universal. While the majority of states do not consider fault as a bar to the *right* of distribution, *see* Tischler, *Distribution of Property Upon Divorce*, 94 N.J.L.J. 1109, 1116 (1971), many hold that it is a legitimate factor within the distribution itself. *E.g.*, Ruprecht v. Ruprecht, 255 Minn. 80, 90, 96 N.W.2d 14, 23 (1959); Kassebaum v. Kassebaum, 178 Neb. 812, 817, 135 N.W.2d 704, 707 (1965); Novlesky v. Novlesky, 206 N.W.2d 865, 869 (N.D. 1973); Lacey v. Lacey, 45 Wis. 2d 378, 383-84, 173 N.W.2d 142, 145 (1970); *contra, In re* Marriage of Bare, — Iowa —, 203 N.W.2d 551, 555 (1973); Colley v. Colley, 460 S.W.2d 821, 826 (Ky. 1970). However, the *Painter* position is consistent with the idea that the state's new divorce statute is intended to de-emphasize the role of fault in the dissolution of the marriage.

56. *See* note 48 and accompanying text *supra*.

57. Painter v. Painter, 65 N.J. 196, 212, 320 A.2d 484, 492 (1974). *Accord* Vanover v. Vanover, 496 P.2d 644, 648 (Alaska 1968); Bell v. Bell, 150 Colo. 174, 177, 371 P.2d 773, 774 (1962); Reitz v. Reitz, 338 Mich. 309, 313, 61 N.W.2d 81, 83 (1953); Krohn v. Krohn, 284 Minn. 95, 98, 169 N.W.2d 389, 391 (1969); Workman v. Workman, 164 Neb. 642, 650, 83 N.W.2d 368, 374 (1957); Agrest v. Agrest, 75 N.D. 318, 329, 27 N.W.2d 697, 703 (1947); Lacey v. Lacey, 45 Wis. 2d 378, 383, 173 N.W.2d 142, 145 (1970).

58. *E.g.*, Vanover v. Vanover, 496 P.2d 644, 648 (Alaska 1968); Bell v. Bell, 150 Colo. 174, 177, 371 P.2d 773, 774 (1962); Reitz v. Reitz, 338 Mich. 309, 313, 61 N.W.2d 81, 83 (1953); Workman v. Workman, 164 Neb. 642, 650, 83 N.W.2d 368, 374 (1957); Ruff v. Ruff, 78 N.D. 775, 783-84, 52 N.W.2d 107, 111 (1952); McCoy v. McCoy, 429 P.2d 999, 1004 (Okla. 1967); Bryant v. Bryant, 478 S.W.2d 602, 605 (Tex. Civ. App. 1972); Friedlander v. Friedlander, 80 Wash. 2d 293, 305, 494 P.2d 208, 215 (1972); Lacey v. Lacey, 45 Wis. 2d 378, 383, 173 N.W.2d 142, 145 (1970); Allen v. Allen, 132 Vt. 182, 185, 315 A.2d 459, 461, 462 (1974).

failing to specify what assets are to be eligible for equitable distribution.[59] Appellant's allegation of vagueness was dismissed.[60] The court noted that the purpose of the distribution provision is to divide the property between the spouses in a fair manner. The fact that this might require judicial interpretation in specific instances was held insufficient to render the provision void.[61] The court proceeded, however, to set down mandatory rules rather than guidelines on the questions of eligibility.

Initially, the court exempted from distribution property brought into the marriage by either spouse.[62] This decision was based upon the express language of the statute.[63] However, the court's further holdings, which were based upon this exemption of previously-owned property, are not easily reconcilable with the court's professed reluctance to adopt rules of community property.[64]

The first such holding stated that any increase in the value of property brought into the marriage by either spouse is also ineligible.[65] The court announced that this rule might not "necessarily" apply in situations in which the increase is due to the contributions of the other spouse or of both spouses jointly.[66] How the court clarifies its position on this issue in future decisions will reveal whether it is actually seeking to avoid the adoption of community property rules. The holding at present exceeds the breadth of the exemption granted under the community property concept.[67]

The second holding ruled that all profits derived from ineligible

59. Painter v. Painter, 65 N.J. 196, 213, 214, 320 A.2d 484, 493 (1974).
60. *Id.*
61. *Id.*
62. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974). In all cases in which assets are claimed ineligible for distribution, the claiming party must sustain the burden of proof. This is in accord with the practice in community property states. 4A R. POWELL, THE LAW OF REAL PROPERTY 722, 723 (rev. ed. 1973).
63. *See* note 4 and accompanying text *supra.*
64. *See* note 37 and accompanying text *supra.*
65. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974).
66. *Id.* at 214, 320 A.2d at 493, n.4.
67. The civil code recognizes a distinction between increases in the value of separate property which are attributable to the efforts of one or both spouses and increases which are due merely to an upswing in market values. Only such accretions which are not the product of spousal effort may remain "separate" property and thus ineligible for distribution upon divorce. Thus, if a spouse brings corporate stock into the marriage and has no control over its market price, the rule is that any increase in value, as well as the original value, will remain separate property. However, if the corporation involved is merely the *alter ego* of one of the spouses, any increase in its value is considered the result of that spouse's efforts, and, hence, it becomes community property eligible for distribution.

property or the income derived from the sale or exchange thereof is also to be considered ineligible.[68] The rule of community property on this question is in conflict. At civil law, the fruits and profits of separate property are considered community property if obtained during the marriage.[69] Thus they are eligible for distribution. Five community property states[70] have rejected this rule and consider such assets separate. The remaining three,[71] however, continue to consider such assets to be community property, eligible for distribution. Since the *Painter* court professed a reluctance to adopt the rules of community property which render assets ineligible for distribution,[72] it is logical that the court would have held in accord with the view of the latter three states, rather than with that of the former five.

On the issue of the eligibility of assets obtained by a spouse through gift or inheritance, however, the court did unequivocally reject the rule prevalent among the community property states and found such assets to be eligible for distribution, reversing the superior court.[73] This ruling was based upon the court's determination that the legislature intended that the term "acquired" should properly include a passive, as well as active, type of procurement.[74] The court reasoned that if the legislature had intended only the more restricted meaning of "acquired," it would have so stated within the statute.[75] In addition, the *Painter* court refused to validate the lower court's definition of the term because of its reluctance to incorporate a rule of the civil code[76] into a statute of a

68. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974).

69. 1 W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 180 (1943).

70. *Id.* at 181, 182. The states are Arizona, California, Nevada, New Mexico, and Washington.

71. *Id.* at 181. The states are Idaho, Louisiana, and Texas.

72. *See* note 37 and accompanying text *supra*.

73. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974).

74. *Id.* at 215, 320 A.2d at 494. The superior court had defined "acquired" as "attained by the individual by his own efforts," *citing* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1965). The supreme court defined the term as "gained by any means." This more comprehensive definition has been accepted in many decisions. *E.g.* Crutchfield v. Johnson & Latimar, 243 Ala. 73, 76, 8 So. 2d 412, 414 (1942); Weinberg v. Baltimore & Annapolis R.R., 200 Md. 160, 165, 88 A.2d 575, 577 (1952); Commissioner of Ins. v. Broad St. Mut. Cas. Ins. Co., 312 Mass. 261, 263, 44 N.E.2d 683, 684 (1942); Chief Freight Lines v. Industrial Commission, 366 S.W.2d 48, 53 (Mo. 1963).

75. Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484, 494 (1974).

76. Actually, the civil law was much less rigid on the question of the ineligibility of gifts or inheritances than are the present statutes of the community property states which exclude all assets so obtained. The early Spanish code made a distinction between remunerative gifts, those obtained obviously in return for services rendered, and donative gifts, which were obtained from one with purely charitable motives. Remunerative gifts were taken by "onerous title" and were considered community property. Donative gifts were taken by "lucrative title" and were considered separate property. This distinction reflected the idea that any asset obtained through the effort of either or both spouses was community property. The

common law state absent specific legislative direction.[77]

The result, if not the approach, of the *Painter* decision on the issue of the distributive eligibility of assets obtained through gift or inheritance is in accord with holdings of other common law states where this question has arisen; in the absence of legislative mandate in those states, assets so obtained are not excluded on that basis from distribution upon divorce.[78] The *Painter* ruling is also more consonant with the purpose[79] of equitable distribution than is the contrary rule of exclusion. Often the fact that a gift or inheritance has been brought into the marriage, even if it is left untouched in a bank account, influences the action of both spouses in decisions such as whether or not to seek or maintain present employment. If, for example, a wife leaves her job because her husband has inherited a large sum and her extra earnings are no longer essential, it is patently unfair to withhold from the wife upon divorce a share of that sum or the assets purchased with it. This also applies in cases in which the spouse who is not the recipient of the gift or inheritance continues to work in order to keep the windfall in reserve.[80]

The final holding of the *Painter* court was a determination of the date upon which the marriage should be considered terminated for purposes of distribution.[81] The necessity for this determination is obvious; assets obtained after the marriage has ended are expressly immune from distribution under the statute.[82] The court decided that the period of marriage ends on the date on which either party files a complaint requesting a judgment of divorce.[83]

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distinction was apparently blurred in the transmutation of the civil code into the statutes of the community property states. *See* 1 W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 179 (1943).

77. Painter v. Painter, 65 N.J. 196, 216, 217, 320 A.2d 484, 495 (1974).

78. Campbell v. Campbell, — Ala. —, 285 So. 2d 105, 107 (1973); Santilli v. Santilli, 169 Colo. 49, 52, 453 P.2d 606, 608 (1969); Almquist v. Almquist, 214 Kan. 788, 792, 522 P.2d 383, 386 (1974); Zimmers v. Zimmers, 346 Mich. 28, 34-35, 77 N.W.2d 267, 270, 271 (1956); Reitz v. Reitz, 338 Mich. 309, 61 N.W.2d 81, 83 (1953); Kassebaum v. Kassebaum, 178 Neb. 812, 817, 135 N.W.2d 704, 707 (1965); Williams v. Williams, 428 P.2d 218, 222 (Okla. 1967).

79. The theory behind the distribution of property upon divorce is based upon a recognition that both spouses contribute to the economic success of the marriage even though only one, usually the husband, may be earning the income with which the assets of the marriage are obtained. Therefore, upon dissolution of the marital relationship, both spouses are entitled to a share of such property regardless of in whom the title rests. *See* Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 503 (1974).

80. *See* Santilli v. Santilli, 169 Colo. 49, 52, 453 P.2d 606, 608 (1969).

81. Painter v. Painter, 65 N.J. 196, 218, 320 A.2d 484, 495 (1974).

82. *See* note 4 and accompanying text *supra.*

83. Painter v. Painter, 65 N.J. 196, 218, 320 A.2d 484, 495 (1974).

This decision was based upon the rejection of two hypothetical "straw-man" alternatives.[84] The first of these would consider the marriage terminated upon the date of the judgment of divorce. The court acknowledged that this represents the literal meaning of the statutory language.[85] However, the value assigned to each asset for purposes of distribution is the value as of the date of the termination of the marriage. If the date of the judgment of divorce is also the date of the end of the marriage, subsequent hearings would be required to determine the value of the assets.[86] The burden and expense of such additional adjudications make their avoidance desirable if possible. The second alternative would consider the marriage terminated upon the date of an occurrence which establishes a cause of action for divorce or at least reveals the existence of an "irretrievable breakdown" in the marital relationship.[87] The court observed that this would be the most equitable solution.[88] However, it noted that application of this rule would be impossible in the majority of cases in which an inextricable network of factors combine to undermine the marriage.[89]

The *Painter* theory of equitable distribution of marital assets recognizes the economic interdependence of the spouses during marriage and seeks to equalize their relative economic positions upon termination of the marital relation. The most appropriate means of effectuating this just result is to require the distribution of all assets which contributed to the economic maintenance of the spouses, regardless of the manner by which such assets were obtained. Through its rulings in *Painter v. Painter* the New Jersey Supreme Court has taken a significant step in that direction.

JOHN A. COVINO

84. *Id.* at 217, 320 A.2d at 495.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

PRODUCTS LIABILITY—REQUIREMENT OF HORIZONTAL PRIVITY ABOLISHED IN ACTIONS BY NON-BUYER CLAIMANTS AGAINST VENDORS UNDER U.C.C. SECTION 2-318

Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974)

In *Salvador v. Atlantic Steel Boiler Co.*,[1] the Supreme Court of Pennsylvania, having found that "the theoretical foundation which once supported horizontal privity has been undermined,"[2] held that "lack of horizontal privity itself may no longer bar an injured party's suit for breach of warranty."[3] This decision overrules *Hochgertel v. Canada Dry Corp.*,[4] which had held that an employee of a buyer could not recover in a breach of warranty action against a remote seller. The expansion by *Salvador* of the class protected by implied warranty under Section 2-318 of the Uniform Commercial Code[5] marks the fall of the last bastion of privity in the products liability law of Pennsylvania.

Ahmed Salvador was injured as the result of an explosion of a steam boiler at his place of employment. As a result of this accident, he suffered the loss of approximately 77% of his ability to hear. Salvador brought an action in assumpsit naming as defendants his employer, the retail seller of the boiler and the manufacturer of the boiler. The manufacturer filed preliminary objections on the basis of lack of privity.[6] The trial court sustained the objections, holding that an employee of a purchaser had no standing to

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1. 457 Pa. 24, 319 A.2d 903 (1974) [hereinafter cited as *Salvador*].
2. *Id.* at 26, 319 A.2d at 904.
3. *Id.*
4. 409 Pa. 610, 187 A.2d 848 (1963) [hereinafter cited as *Hochgertel*].
5. PA. STAT. ANN. tit. 12A, § 2-318 (1970) [hereinafter cited as UNIFORM COMMERCIAL CODE § 2-318]:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by goods and who is injured in person by breach of the warranty. A seller may not exclude or limit operation of this section.

For a full discussion of the development and application of U.C.C. § 2-318 *see* 3 S. WILLISTON, SALES § 22 (4th ed. Squillante & Fonseca 1974).

6. "Privity of contract is that connection or relationship which exists between two or more contracting parties." BLACK'S LAW DICTIONARY 1362 (4th ed. 1951). *See* 4 A. CORBIN, CONTRACTS § 778 (1951); 3 S. WILLISTON, SALES § 22-5 (4th ed. Squillante & Fonseca 1974).

bring an action against the manufacturer of a defective product. On appeal, the superior court reversed,[7] holding that the lack of horizontal privity[8] did not bar an employee's action for breach of implied warranty.[9] The Pennsylvania Supreme Court granted the manufacturer's petition for allowance of appeal.

In affirming the decision of the superior court, the supreme court in *Salvador* explicitly overruled *Hochgertel*. The supreme court's opinion, however, did not emphasize the differences between *Hochgertel* and *Salvador* but rather focused on the evolution in the law of products liability that caused this ensuing change. The significance of this change is apparent in the opinion of Justice Roberts which concludes:

> This is not an occasion when a court reexamines its precedents and finding them in error returns to the "correct" view. On the contrary, as we have said, when *Hochgertel* was decided it was clearly the appropriate accommodation between the law of torts and the law of contracts. Since then Pennsylvania products liability law has progressed and demands of public policy as well as legal symmetry compel today's decision.[10]

Therefore, to place *Salvador* in the proper perspective it is necessary to review the state of Pennsylvania law at the time of *Hochgertel* and to examine the demands of public policy and legal symmetry that led to the *Salvador* decision.

The period in which *Hochgertel* was decided was "a veritable revolution against the artificial strictures of privity of warranty."[11] The Pennsylvania courts had long since adopted the rule of *Mac-*

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7. Salvador v. I.H. English of Phila., Inc., 224 Pa. Super. 317, 307 A.2d 398 (1973), *aff'd sub nom.* Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974).

8. Horizontal privity deals with a non-purchaser's ability to bring suit against one who is on the chain of sales. It has often been discussed in terms of "who can sue?" Vertical privity concerns a purchaser's ability to sue someone on the chain of sale other than the immediate vendor. Its question is "who can be sued?" *See* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 282 (1970); 3 S. WILLISTON, SALES § 15 (4th ed. Squillante & Fonesca 1974); Note, 68 DICK. L. REV. 444, 446 (1964).

9. A warranty is a statement or representation made by the seller of goods contemporaneously with, and as part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be taken as he represents them. . . . A warranty is implied when the law derives it by implication of inference from the nature or the transactions, or the relative situation or circumstances of the parties.

Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501, 506 (1964). *See* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 75 (1970); 3 S. WILLISTON, SALES § 19 (4th ed. Squillante & Fonseca 1974).

10. Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 33, 319 A.2d 903, 908 (1974).

11. Jaeger, *Privity of Warranty: Has the Toscin Sounded?*, 1 DUQUESNE L. REV. 1 (1963). *See* PROSSER, *The Assault Upon the Citadel: Strict Liability to the Consumer*, 69 YALE L.J. 1099 (1960).

pherson v. Buick Motors[12] which had eliminated the need for privity in an action for negligence.[13] The Pennsylvania courts had also abolished the privity requirement in warranty actions dealing with food products for human consumption.[14] While a number of courts had suggested that Pennsylvania had already abandoned privity requirements in all implied warranty cases,[15] the supreme court in *Hochgertel* clearly held otherwise.[16]

In *Hochgertel,* a bartender was injured by flying glass from an exploding bottle which had been purchased by the bartender's employer. The bartender brought suit against the manufacturer of the bottle on the basis of implied warranty. The *Hochgertel* court ultimately centered on an interpretation of U.C.C. § 2-318.[17] Although the court did find that the warranty of fitness extended to the actual purchaser of the bottle, it found no basis for extending this warranty to an employee of the purchaser.[18] The court reasoned that an employee was definitely not included in any of the categories enumerated in comment 3[19] to U.C.C. § 2-318 but because the comment was neutral to developing case law, a study of Pennsylvania authorities was undertaken.[20] From this study, the court

12. 217 N.Y. 382, 111 N.E. 1050 (1916).

13. The first Pennsylvania case to apply *Macpherson* was Ebbert v. Philadelphia Elec. Co., 330 Pa. 257, 198 A. 232 (1938).

14. *See, e.g.,* Caskie v. Coca Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953); Cantini v. Swift, 251 Pa. 52, 95 A. 931 (1916); Noch v. Coca Cola Bottling Works, 102 Pa. Super. 515, 156 A. 537 (1931).

15. Mansz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

16. The decision in *Hochgertel* came as a surprise to some scholars in the products liability field. *See* Jaeger, *Privity of Warranty: Has the Toscin Sounded?,* 1 DUQUESNE L. REV. 1 (1963). *See also* Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule,* 33 U. PITT. L. REV. 391, 398-99 (1972).

17. *See* note 5 *supra.*

18. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 613, 187 A.2d 575, 576-77 (1963).

19. UNIFORM COMMERCIAL CODE § 2-318, Comment 3:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

20. In reference to the court's interpretation of U.C.C. § 2-318, Professor Murray states:

> Apparently, the court read the comment as suggesting that if the case law in a particular jurisdiction had extended the categories beyond those stated in section 2-318 prior to the enactment of the Code, it was not the intention of the drafters to restrict the categories set forth in the section. However, the converse must be true: if the case law had not extended the categories beyond 2-318 clas-

concluded that with the exception of cases involving food no warranty would be implied in favor of one who is not in the category of a purchaser.[21] Further the *Hochgertel* court saw no policy consideration that would compel a broader interpretation of U.C.C. § 2-318. In fact, if public policy played a role, it was to reinforce the privity requirements:[22]

> To grant such an extension of the warranty, as urged herein, would in effect render the manufacturer a guarantor of his product and impose liability in all such accident cases even if the utmost degree of care was exercised. This would lead to harsh and unjust results.[23]

Within a year, *Yentzer v. Taylor Wine Co.*,[24] a case factually similar to *Hochgertel*, reached a different conclusion. In *Yentzer*, an employee of a hotel was injured when the cork from a wine bottle popped and struck him in the eye. In granting the plaintiff a cause of action against the manufacturer, *Yentzer* was distinguished from *Hochgertel* on the basis that the employee in *Yentzer* had been the actual purchaser of the product. The *Yentzer* court reasoned that since the plaintiff was cast in the important role of buyer, the fact that he was an employee did not bar his cause of action in implied warranty.[25]

The decision in *Yentzer*, however, did not mark the demise of the privity requirement. In 1966, on the basis of *Hochgertel*,[26] the

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> sifications prior to the enactment of the Code, then the categories of 2-318 constitute the furthest extensions—the categories were frozen by 2-318 and further development through "developing case law" is impossible.

Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391, 400 (1972).

21. The *Hochgertel* court based its conclusion that under Pennsylvania case law no warranty would be implied for a nonpurchaser on the case of Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953). In that case, a woman was injured by an exploding soda bottle which had just been removed from a supermarket shelf by her husband. Because there was no purchase involved, *Loch* did not deal with horizontal privity, but rather with vertical privity in a negligence suit based on the doctrines of exclusive control and *res ipsa loquitor*. It was nevertheless held by the *Hochgertel* court to establish horizontal privity as a part of Pennsylvania law.

> 22. Throughout the history of Anglo-American law, courts have been hesitant to hold a defendant to a duty which would unduly restrict either his personal freedom or his economic well-being. The law has always encouraged the expansion of business. This encouragement has had as a by-product a certain amount of injustice to the consumer.

Note, *Product Liability: Employees and the Uniform Commercial Code Section 2-318*, 68 DICK L. REV. 444 (1964). The *Hochgertel* court seems to be following this traditional line of emphasizing the interests of business over those of the consumer.

23. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 615-16, 187 A.2d 575, 578 (1963).

24. 414 Pa. 272, 199 A.2d 463 (1966).

25. *Id.* at 275, 199 A.2d at 464.

26. Although *Hochgertel* dealt with horizontal privity, the court found its reasoning to apply, albeit with some confusion, to a case concerned with vertical privity. *See* Murray, *Pennsylvania Products Liability: A Clarifi-*

need for vertical privity[27] was affirmed in the case of *Miller v. Preitz*.[28] The *Miller* court was willing to extend the protection of the category of "family" under U.C.C. § 2-318 beyond the immediate members of a household, but still required privity of contract for an assumpsit action against a remote seller.[29]

Together with *Miller*, the Pennsylvania Supreme Court issued its opinion in the case of *Webb v. Zern*.[30] As anticipated in *Miller*,[31] the court in *Webb* adopted Section 402A of the *Restatement (Second) of Torts*.[32] Notwithstanding an emphatic dissent,[33] the re-

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cation of the Search for a Clear and Understandable Rule, 33 U. PITT. L. REV. 391, 405 (1972).

27. *See* note 8 *supra*.

28. 422 Pa. 383, 221 A.2d 320 (1966).

29. *Id.* at 392, 221 A.2d at 325. The *Miller* decision, nevertheless, evidenced a marked change in attitude from *Hochgertel*. The majority opinion recognizes the policy considerations in imposing strict liability in tort and stated that "a similar result would follow from abandoning the requirement of 'privity of contract' in warranty actions." *Id.* at 393, 221 A.2d at 333.

30. 422 Pa. 424, 20 A.2d 853 (1966).

31. Both Justices Jones and Roberts advocated the adoption of RESTATEMENT (SECOND) OF TORTS § 402A (1965) in their separate concurring and dissenting opinions. Justice Jones stated:

> The public, with justification, expects that in the case of products of which it has a need and for which it must rely upon those who make any market the product, such manufacturers, be they proximate or remote stand behind their products; the burden of injuries caused by defects in such products should fall upon those who make and market the products and the consuming public is entitled to the maximum of protection. Only through the imposition of liability under the provisions of Section 402(a) can this be accomplished.

Miller v. Preitz, 422 Pa. 383, 411-12, 221 A.2d 320, 334-35 (1966). *See also id.* at 421-22, 221 A.2d at 339-40 (concurring and dissenting opinion of Justice Roberts).

32. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property, if,
>
> (a) the seller is engaged in the business of selling such a product and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

For commentary on strict liability in tort for defective products *see generally* Keeton, *Products Liability—Liability without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Prosser, *The Assault Upon the Citadel: Strict Liability to the Consumer*, 69 YALE L. REV. 1099 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

quirement of proof of negligence in a trespass action for a defective product was eliminated.

In view of the *Webb* holding, the supreme court found it necessary to reconsider its previous opinion in regard to vertical privity. Prior to the adoption of Section 402A, it was felt that legal symmetry demanded the maintenance of privity. After the adoption of strict liability in tort, however, that same legal symmetry seemed to require that the need for privity in implied warranty actions be eliminated in order to provide equal liability in tort and contract.[34] Thus, the supreme court in *Kassab v. Central Soya*[35] abolished vertical privity.[36] Concluding that the result was a natural consequence of Section 402A, the court stated:

> [P]rior to the adoption of section 402A, it could be said to dispense with privity would be to allow recovery in contract without proof of negligence, while requiring a showing of negligence in order to recover for the same wrong against the same defendant if the suit were brought in tort. To permit the result of a lawsuit to depend solely on the caption atop plaintiff's complaint is not now, and never has been, a sound resolution of identical controversies.[37]

While much of the reasoning in *Kassab* was applicable as a basis to eliminate horizontal privity, *Hochgertel* was expressly left untouched by this decision.[38] Thus, the question was raised whether the supreme court was only looking for a better fact situation in which to eliminate horizontal privity or whether the court intended to maintain the narrow interpretation of U.C.C. § 2-318.

The *Salvador* case presented the chance to answer that question. The superior court[39] found that *Kassab* provided ample authority to abolish the horizontal privity requirement. The court reasoned that the policy arguments in *Hochgertel* were moot. The adoption of Section 402A had made a manufacturer a guarantor of his product. Further, to eliminate the requirement of horizontal privity would not impose any greater liability on the manufacturer than already existed in tort.[40] The superior court agreed with *Kas-*

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33. In his dissenting opinion, Chief Justice Bell found that the decision of the majority was "not only unfair but absolutely unjustified in justice or in law." Webb v. Zern, 422 Pa. 424, 429, 220 A.2d 853, 855 (1966).

34. Kassab v. Central Soya, 432 Pa. 217, 230, 246 A.2d 848, 853 (1968).

35. *Id.* at 217, 246 A.2d at 848. The case had been appealed on procedural questions. The plaintiff had mentioned nothing about privity in his brief and the defendant had treated it only superficially. The concurring opinion by Justice Cohen states that the majority should have awaited a "better opportunity" to completely change the traditional doctrine of privity. *Id.* at 240, 246 A.2d at 859.

36. *Id.* at 234, 246 A.2d at 856.

37. *Id.* at 229, 246 A.2d at 853.

38. *Id.* at 232 n.8, 246 A.2d at 855 n.8.

39. Salvador v. I.H. English of Phila., Inc., 224 Pa. Super. 377, 307 A.2d 398 (1973).

40. *Id.* at 385, 307 A.2d at 403.

sab that the Code must be co-extensive with Section 402A[41] and utilized Comment 3 to U.C.C. § 2-318 as a basis to abolish horizontal privity.[42] Possibly with an eye toward a supreme court which had displayed a concern for form and purity of pleading in regard to products liability actions,[43] the superior court noted in conclusion that the action for breach of warranty was originally in tort rather than contract.[44] Thus, the contractual theory of the action for breach of warranty was done no harm by the elimination of the requirement of privity.[45]

The supreme court relied heavily upon the superior court's application of *Kassab*'s symmetry arguments in the context of horizontal privity. The supreme court opinion written by Justice Roberts began by noting that *Kassab* had eliminated the requirement of vertical privity in actions for breach of warranty, leaving unresolved for *Salvador* the single issue of "whether horizontal privity should likewise be abandoned."[46] Having found that the need for privity under U.C.C. § 2-318 was eliminated by the adoption of strict liability in tort, the court concluded that U.C.C. § 2-318 must be enlarged so that it is co-extensive with Section 402A in the case of products liability.[47] As did the superior court,

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41. *Id.* at 383, 307 A.2d at 402.

42. *Id.* at 382, 307 A.2d at 401. While the superior court made no reference to the contrary interpretation of U.C.C. § 2-318 in *Hochgertel*, it noted that other jurisdictions have found the section to be no bar to an employee's right to sue for breach of implied warranty and cites Speed Fasteners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967), and Delta Oxygen Co. v. Swift, 238 Ark. 534, 383 S.W.2d 885 (1964), as examples. The court in *Speed Fasteners* held that an injured employee stands in the shoes of his employer in the ability to sue on an implied warranty. 382 F.2d at 398. In *Delta*, it was found that the requirement of horizontal privity in a case in which the purchaser had been a corporation would effectively insulate the manufacturer from suit because "a corporation could hardly have a burned arm or broken leg." 238 Ark. at 546, 383 S.W.2d at 893.

43. Justice Roberts, in his dissenting opinion in *Miller*, cites "a desire to maintain doctrinal purity and to compel adherence to strict forms of pleading," as the reasons for the court's maintaining vertical privity while at the same time recognizing strict liability in tort. Miller v. Preitz, 422 Pa. 383, 415, 221 A.2d 320, 336 (1966) (Roberts, J., dissenting).

44. *See* Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); Jaeger, *Privity of Warranty: Has the Toscin Sounded?*, 1 DUQUESNE L. REV. 1, 6-27 (1963); Prosser, *The Assault Upon The Citadel: Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1126-1127 (1960); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 634-35 (4th ed. 1971).

45. Salvador v. I.H. English of Phila., Inc., 224 Pa. Super. 377, 385-86, 307 A.2d 398, 407 (1973).

46. Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 25, 319 A.2d 903, 904 (1974).

47. *Id.* at 31, 319 A.2d at 907 (quoting Kassab v. Central Soya, 432 Pa. 218, 228-29, 231, 246 A.2d 848, 853, 854 (1968)).

the supreme court found that the thrust of *Kassab* was the desire to reach the same result in a products liability suit whether brought in tort or contract.[48] The supreme court also agreed with the superior court's conclusion that these arguments, while dealing in *Kassab* only with vertical privity, apply as well for horizontal privity.[49]

The supreme court's decision was, however, more than an echo of the reasoning of the superior court. The Roberts opinion, by tracing the history of Pennsylvania products liability law since *Hochgertel*, emphasized the evolution in this area of the law. The significance of this gradual change is apparent in the summary of *Hochgertel*. Although no criticism is made of *Hochgertel*'s limited application of U.C.C. § 2-318, the court illustrates an alternative approach in *Peterson v. Lamb Rubber Co.*,[50] which held an employee to be a part of the employer's industrial family.[51] Similarly, Justice Roberts also noted *Hoffman v. A.B. Chance Co.*,[52] which stated that in light of *Kassab*, *Hochgertel* "would be reversed by a reasonable intelligent lawyer sitting on that court today."[53]

The court continues its emphasis on this gradual change in products liability by stating that Justice Eagen's dissent in *Yentzer v. Taylor Wine Co.*[54] "properly pointed out that the [*Yentzer*] court's analysis represented a clear departure from *Hochgertel*."[55] Even *Miller v. Preitz*[56] is evidence of this change in light of Justice (now Chief Justice) Jones's dissent, which is quoted by the *Salvador* court in a footnote.[57] While believing the concept of privity unsound, Jones felt that if it must be retained it should extend to

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48. *Id.* at 26-27, 319 A.2d at 905.

49. *Id.* at 31, 319 A.2d at 905.

50. 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

51. [I]t is a matter of common knowledge, and of course known to the vendor manufacturers, that most businesses are carried on by means of the assistance of employees and that equipment or supplies purchased by the employers will in actual use be handled by the employees, who in that respect may be said to stand in the shoes of the employer.

Id. at 347, 5 Cal. Rptr. at 869, 353 P.2d at 581. *See also* Speed Fastners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967); Delta Oxygen Co. v. Swift, 238 Ark. 534, 383 S.W.2d 885 (1964); Murray v. Bullard Co., 110 N.H. 220, 265 A.2d 309 (1970). *But see* Haragan v. Union Oil Co., 312 F. Supp. 1392 (D. Alas. 1970); Hargrove v. Newsome, 225 Tenn. 462, 470 S.W.2d 348 (1971).

52. 346 F. Supp. 991 (M.D. Pa. 1972). *But see* Tucker v. Capital Machine, Inc., 307 F. Supp. 291 (M.D. Pa. 1969).

53. 346 F. Supp. at 992.

54. 414 Pa. 272, 199 A.2d 463 (1966).

55. Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 29, 319 A.2d 903, 906 (1974) (quoting Yentzer v. Taylor Wine Co., 414 Pa. 272, 277, 199 A.2d 463, 465 (1964)).

56. 422 Pa. 383, 221 A.2d 320 (1966). *See* notes 26-29 and accompanying text *supra*.

57. Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 30 n.12, 319 A.2d 903, 906 n.12 (1974) (quoting Miller v. Preitz, 422 Pa. 383, 408-09, 221 A.2d 320, 333 (1966)).

any person whom the seller could have foreseen would use, consume, or be affected by the product.

Justice Roberts explored the policy reasons behind the evolution in products liability law. He focuses on the *Hochgertel* court's concern for the "fate" of the manufacturer. Noting that after *Webb*, a manufacturer would be faced with strict liability, Roberts found that there was no social benefit in allowing a manufacturer to avoid liability after having marketed a defective product.[58] In fact, the "harsh and unjust" results feared by the *Hochgertel* court are now "worked on the plaintiff who may recover for his injury or loss if his complaint is in trespass, but on identical facts would be denied relief if the pleading is captioned 'Complaint in Assumpsit.' "[59]

By the elimination of the requirement of horizontal privity under U.C.C. § 2-318, Pennsylvania law seems to have finally reached the interpretation intended by those who drafted the Uniform Commercial Code twenty-five years before the *Salvador* decision.[60] However, removal of the final barrier to a manufacturer's liability for a defective product does not necessarily end the confusion which has plagued the field of products liability. Problems arise when rules designed for commercial purposes are adapted to apply in the realm of tort. One possible area of confusion is the application of the statute of limitations of the U.C.C.[61] in a claim

58. *Id.* The court mentions three policy reasons for the abolition of privity: public interest in the protection of human life; responsibility to the public imposed on the manufacturer through marketing and advertising his product; and avoiding multiplicity of actions by allowing a direct action by an injured party against a manufacturer. *Id.* at 33 n.15, 319 A.2d at 908 n.15 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97 at 650-61 (4th ed. 1971)).

59. *Id.* at 32, 319 A.2d at 907.

60. UNIFORM COMMERCIAL CODE § 2-318 (1949 Draft):

> A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or whose relationship is such to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Apparently the third category in this section—those who could be reasonable expected to use the product—was deleted by the drafting committee to insure adoption of the Code by states whose case law was in conflict with this provision. Note, *Products Liability: Employees and the Uniform Commercial Code, Section 2-318*, 68 DICK. L. REV. 444, 447 (1963). *See Report No. 3 of the Permanent Editorial Board for the Uniform Commercial Code* (1967) ("Reason for Change" in 1966 Recommended Amendments to § 2-318); Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391, 396-98 (1972)).

61. PA. STAT. ANN. tit. 12A, § 2-725 (1970) provides in part:

for personal injuries.[62] Hopefully, in approaching these prospective problems the courts will keep in mind the rationale of the *Kassab* decision that "[t]o permit the result of a lawsuit to depend solely on the caption atop the plaintiff's complaint is not now, or ever has been, a sound resolution of identical controversies."[63] Having finally formulated a coherent products liability rule, technicalities in form and pleading should not be allowed to once again bar meritorious claims.

ROBERT T. EBERT

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(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await performance the cause of action accrues when the breach is or should have been discovered.

62. There is no discussion of the question of the statute of limitations in the supreme court opinion in *Salvador*. The superior court touches on it only briefly. No problem was found in applying the four year limit for a contract action, ostensibly with the cause of action accruing at the time of injury. As a basis for this conclusion the superior court cites Gardner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1965), in which the four year statute of limitations under U.C.C. § 2-725 was held to apply for an assumpsit action for personal injuries. No reference, however, was made in the *Gardner* case as to when the cause of action accrued. The superior court did not cite *Rufo v. Bastian-Blessing Co.*, 417 Pa. 415, 197 A.2d 612 (1963). In this case an action for breach of warranty was barred because the complaint was filed more than four years after the date on which the plaintiff had taken control of the defective product.

Such an application of U.C.C. § 2-725 could lead to a situation in which one's cause of action for personal injury is barred by the statute of limitations before there is any injury. This would occur when the injury happens more than four years after the purchase of the product, the point at which the statute begins to run. For a full discussion of this problem see Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391, 416-21 (1972); Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 260-66 (1973).

63. Kassab v. Central Soya, 432 Pa. 217, 229, 246 A.2d 848, 853 (1968).